

Outsiders look with surprise at the climate change in the Netherlands. As well as the Dutch themselves. Their country seemed to be a multi-cultural paradise. But today populists are dominating politics and media. Much to the chagrin of the old political elite, including the progressive Head of State, Queen Beatrix. Geert Wilders now even backs a new minority government. In this context, this booklet aims at explaining the Dutch governmental system, especially during the formation of a new government. How democratic is this process? How to explain the influential position of the Queen? Are we staring in a democratic gap?

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AN WILLEM SAP THE QUEEN, THE POPULISTS AND THE OTHERS



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New Dutch Politics explained to Foreigners

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VU UNIVERSITY PRESS

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A concise history of the Dutch monarchy

The origin of the State of the Netherlands can be placed in 1579. Thanks to the help of Prince William of Orange, also named William the Silent, the Northern Low Countries joined forces in the Union of Utrecht in the freedom struggle against Spain. In 1581 Philip II of Spain was abjured by the Declaration of Independence. After 1648 the Netherlands was recognized as an independent power. From 1579 till 1795 the Dutch Republic was a confederation of seven sovereign provinces. The organs of the general government were the States General and the Stadholder (Dutch: *stadhouder*; literally: *locum tenens*, the person holding the place of the king), the chief political and military leader, very often a member of the House of Oranje-Nassau. These organs were formally subject to instructions from the Councils of the Provincial Estates. In 1795 there was an anti-aristocratic 'velvet revolution' in the Netherlands, inspired by the French Revolution, and the stadholder was forced to leave the country. Under French influence the sovereign powers of the provinces were dismantled and the Netherlands became a unitary state. The 'Batavian Republic' was recognized by France as an independ-

ent state, but came to an end in 1806, when Louis Napoleon assumed government over the Kingdom of Holland. Because Emperor Napoleon was not satisfied with the government of his brother Louis as King of Holland, the country was incorporated into the French Empire in 1810.

After Napoleon's losses in 1812 and 1813 the Dutch regained control. The Dutch freedom movement led by G.K. van Hogendorp invited Willem Frederik van Oranje-Nassau, son of the last stadholder William v, living in England, to return to the United Netherlands. Willem Frederik arrived by boat at Scheveningen on 30 November 1813. By proclamation of 2 December 1813 he accepted the title 'Sovereign Prince' (*soeverein vorst*). The 1814 Constitution of the United Low Countries refers to Willem Frederik van Oranje-Nassau also as 'Sovereign Prince', but in 1815 Willem Frederik accepted the title of King. In that year an amendment to the Constitution of 1814 changed the title of Sovereign Prince to King. The name of the state changed into the Kingdom of the Netherlands. In the Constitution of the Kingdom of the Netherlands of 1815 the Northern and Southern Low Countries were united, although in the procedure the Belgian no-show voters were counted among those voting in favour. The Congress of Vienna wanted to have a powerful country on the northern borders of France.¹

The rule of King William I in the constitutional monarchy, who reigned with enlightened despotic features from 1814 until 1840, was centralistic and autocratic. An uprising in Belgium in 1830, influenced by revolutionary sentiments in France, led to the secession of Belgium. Structural reforms of the Dutch constitutional monarchy, like full ministe-

rial responsibility (the motion of no confidence had not yet been introduced), inviolability of the king and direct election of the Second Chamber of Parliament, only appeared in the liberal revision of the Dutch Constitution in 1848. That the Dutch monarchy survived in 1848. was in part because King William II, who reigned from 1840 until 1849, was impressed by the democratic revolutions across Europe. The King had to accept the constitutional reforms proposed by the liberal statesman J.R. Thorbecke. His son, the autocratic King William III, reigned from 1849 until 1890 and had a bad relationship with Parliament. In the years 1866-1868 the Second Chamber or Lower House managed to get control over government with the introduction of the motion of no confidence, changing the constitutional monarchy into a constitutional monarchy with a parliamentary system. In the Netherlands the responsibility for governing the country rests with the cabinet on behalf of Parliament. In 1879 King William III married Emma van Waldeck-Pyrmont. On 31 August 1880 their daughter Wilhelmina was born, who was queen from 1890 until 1948. During World War II she provided strong moral leadership from London and became a sort of national 'mother' for the Dutch people.

Wilhelmina's daughter Juliana reigned as queen from 1948 until 1980. The Dutch people strongly identified with the human side of Juliana. In the Netherlands, a more or less fragmented society, the monarchy provides symbolic unity and continuity. The governance of the country is in the hands of the government, not the monarch itself but the monarch plus the Council of Ministers or one minister. The relations with the Netherlands Antilles and Aruba were enshrined in the Charter of the Kingdom of the Netherlands (1954). The

investiture of Juliana's daughter Beatrix took place in 1980. Queen Beatrix carries out her task very seriously and is aware of the constitutional rule that all actions of the Crown must be approved by Parliament. She plays a role in the opening of Parliament, presides over the Council of State, signs all laws, receives the heads of diplomatic missions, represents the state abroad, and is allowed to play a role in the cabinet formation.

Organization and conduct of the Dutch monarchy

Rights of accession

Article 24 of the Dutch Constitution states that the founder of the royal family is King William I, Prince of Oranje-Nassau. Article 1 of the Statute states that the throne shall pass through inheritance to Her Royal Highness Juliana, Princess of Oranje-Nassau and thereafter to her lawful progeny. Effectively, the meaning of Article 1 of the Statute is the same as that of Article 24 of the Constitution. Article 5 of the Statute refers to the Constitution for the rules of accession. These were amended in the constitutional revisions of 1815, 1887, 1922, 1963 and 1983.

Some European countries adopted the Salian system, which debarred women from acceding to the throne. Others applied the Castillian system, whereby, in equal degrees of blood relationship to the deceased monarch, males take precedence over females and older males take precedence over younger males. If the male heir predeceases the monarch, his heirs are then next in line to the throne, even if

there are no males among them. In the Dutch Constitution of 1887 the throne passed by primogeniture to the sons and further male heirs in the direct line of descent from William I with right of representation and with the older line taking precedence over the younger line and the older branch taking precedence over the younger. In the absence of male heirs the throne passed to the oldest surviving daughter of the deceased monarch and otherwise to his heirs through the female line. If there were no heirs, the throne then passed to princesses of Oranje-Nassau in the indirect lines of descent from King William I, and finally to the heirs of Princess Caroline van Oranje, sister of stadholder Willem v and spouse of the Prince of Nassau-Weilburg.

Queen Wilhelmina succeeded her father in 1890 because there was no male heir. As Wilhelmina only had one daughter, Juliana, the throne would in all likelihood pass to collateral relatives in the form of German princes. This situation led, in 1922, to a restriction in the rights of accession through the female line, whereby collateral relatives of Queen Wilhelmina were excluded from hereditary succession. When the Constitution was revised in 1963 the Castilian system was adopted to confirm the principle that the dynasty would also be continued through the female line. In the revision of 1983 the precedence of sons above daughters was abandoned.

Under Article 25 of the current Constitution the throne passes to the legitimate descendants of the deceased or abdicated king in order of seniority with substitution governed by the same rule. Article 26 states that, for the purposes of

succession, a child that is still in the womb upon the death of a monarch is deemed to have already been born. If it is stillborn, it is deemed to have never existed. Article 27 states that succession upon abdication follows the rules set out in the preceding articles. Children and further issue born after the abdication are excluded from succession.

Article 28 states that if the king or anyone in the line of succession marries without having obtained approval by Act of Parliament, he abdicates or renounces hereditary succession. The States-General meet in plenary session to consult and decide on a proposal to grant such permission.

Around the time when the engagement was announced between Prince Johan Friso, the second son of Queen Beatrix, and Mabel Wisse Smit, it emerged that Mabel Wisse Smit had been acquainted with the drugs dealer Klaas Bruinsma. In October 2003 Prime-Minister Balkenende announced that the government would not submit a request to the States-General to approve the intended marriage. As a result of the government's decision, Johan Friso forfeited his right to the throne. He is now no longer a member of the Royal House, though he is still a member of the Royal Family. It was not the relationship with Bruinsma that scuppered parliamentary approval, but the fact that the Prime-Minister had been given 'incomplete and inaccurate information'.

In the event of exceptional circumstances, such as serious physical or mental defects, the government may, under Article 29, submit a proposal to exclude one or more persons from the line of succession. Any such proposal requires a two-thirds majority of the votes cast before it can be adopted by the States-General in plenary session.

What if the monarch is unlikely to have an heir, or dies without one? Should an heir or monarch be appointed? Or should the monarchy be abolished? The Constitution of 1983 supports the principle that the current system of governance be retained. A two-thirds majority of the votes in a plenary session of the States-General is required for the appointment of a successor. But an impasse could develop if there were no two-thirds majority to appoint a successor or to introduce the necessary constitutional amendments to pave the way for a republic. Article 30 states that, in such circumstances, the States-General must be dissolved and that a decision should be taken in a plenary session of the newly elected chambers.

The abdication procedure is set out in Article 27, which states that an heir to the throne cannot abdicate in advance. Queen Wilhelmina abdicated on 4 December 1948 at the age of 68, Queen Juliana abdicated on 30 April 1980 at the age of 71. The abdication documents were countersigned by members of the cabinet at that time even though, strictly speaking, according to the Constitution, there was no need for a Royal Decree. That said, it is prudent to execute an abdication by Royal Decree – i.e. with counter-signatories – as it gives formal expression to the principle of ministerial responsibility.²

Accession occurs immediately upon the death or abdication of the monarch: ‘The King is dead, long live the King!’ or ‘The King never dies’.

The succession is governed by the principle of continuity and takes place by operation of law (Article 32). This means that the swearing in and inauguration do not have any independent legal effect. In the Netherlands monarchs are not

crowned but invested as heads of state. According to the Constitution, the investiture must take place in Amsterdam at a public joint session of the First and Second Chamber of the States-General. Investiture takes place in Amsterdam (the capital) to compensate for the fact that the seat of government is in The Hague. The monarch swears or affirms allegiance to the Charter of the Kingdom of the Netherlands and the Constitution with the following words: ‘I solemnly swear (affirm) to the peoples of the Kingdom that I shall constantly preserve and uphold the Charter of the Kingdom of the Netherlands and the Constitution. I swear (affirm) that I shall defend and preserve the independence and the territory of the Kingdom to the best of my ability, that I shall protect the freedoms and rights of all Dutch nationals and all persons living in the Netherlands, and that I shall employ all means placed at my disposal by the law to support and promote the welfare of all, as is incumbent upon a good and faithful King. So help me God! (This I affirm and promise).’

Ineffectuality

The Constitution determines the procedure in situations where the monarch is unable to exercise royal authority. These procedures come into effect in three cases. The first case is when the monarch has not yet reached the age of majority (18) (Article 33). The second is when the monarch is deemed unfit to rule (Article 35). If the Council of Ministers decides that the monarch is incapable of exercising his royal authority, it reports its findings to the States-General, having first sought the advice of the Council of State. The States-General assembles in plenary session and if they share the

judgement of the Council of Ministers the monarch is declared unfit to rule. The declaration is made by the President of the plenary session of the States-General and takes effect immediately. The law does not need to be invoked to make the declaration, but it does need to be invoked to reverse it. The monarch may then take up where he left off and again exercise his royal authority. Long-term absence or physical or mental illness can result in such a declaration. There have been two instances since 1814: when William III took ill in 1889 and 1890.

The third case is addressed in Article 36. The monarch is able to temporarily relinquish his royal authority and to re-assert it by virtue of a law that he himself instigates. The decision is taken by the States-General in plenary session. The state of health of Queen Wilhelmina led to these powers being invoked under an Act passed on 10 October 1947. As the duration of the relinquishment had not been determined beforehand, there were no procedures to re-instate them. Article 36 of the Constitution determines how this is to be regulated by law.

The question arose whether the monarch's decision to temporarily relinquish his royal authority (or to abdicate) is taken outside ministerial responsibility, regardless of the countersigning. Article 36 may be interpreted in a way which suggests that an Act of Parliament would be needed to re-assert royal authority but not to relinquish it. However, given the import of these decisions, a legal foundation is desirable. The time of relinquishment and re-assertion can be determined in a royal decree, which evolves under ministerial responsibility. As the monarch does not have royal authority, the royal decree to re-instate it must be signed by the regent.³

Article 37 of the Constitution sets out the conditions for the re-assertion of royal authority. The regent deputizes for the monarch in the following five cases for as long as:

- 1 the monarch has not yet reached the age of eighteen years;
- 2 an unborn child can accede to the throne;
- 3 the monarch is declared unfit to rule;
- 4 the monarch has temporarily relinquished royal authority;
- 5 there is no successor after the death or abdication of the monarch.

In cases three and four, the monarch's child, who is presumably also heir to the throne, legally becomes regent, provided he has reached the age of eighteen. In the other cases a regent is appointed by an Act of Parliament. The States-General meet in plenary session and take a decision. Article 38 states that in the absence of a monarch or regent, royal authority shall be exercised by the Council of State. The aim of the article is to provide a safety net but it creates a problem at the same time because the Constitution does not say who is to decide, under such circumstances, that the Council of State is to act. It may be assumed that the task falls to the Council of Ministers (the government cannot take this decision because the monarch is part of the government) in consultation with the Chambers of the States-General.

The Royal House

Interestingly, the Constitution mentions the members of the Royal House despite the fact that they have no official powers or obligations, apart from the specially regulated

powers in Section 2 of the Council of State Act (*Wet op de Raad van State*). Article 39 of the Constitution: ‘Membership of the Royal House shall be regulated by Act of Parliament’ was added so that the subsequent ministerial responsibility for members of the Royal House could be more sharply defined. The members of the monarch’s family who qualify as members of the Royal House as regulated in the Membership of the Royal House Act of 2002 are the monarch (also an abdicated monarch), those who can succeed the monarch under the Constitution and are blood relatives no further than the second degree, the heir presumptive and the spouses of the aforesaid. There is no formal difference in the responsibilities of members of the Royal House – except in the case of the monarch himself – and other members of the Royal Family, though the crown prince is, of course, closer to the throne.

Under the Constitution and the Royal House Finances Act, the State pays allowances directly to Queen Beatrix, Prince Willem-Alexander and Princess Máxima. The other members of the Royal House do not receive allowances. The allowances consist of three components: Component A, which relates to staff costs; Component B, which relates to other expenses; Component C, which is the income component. The following table shows the estimated allowances for 2008 (in thousands of euros):

RECIPIENT	A	B	C	TOTAL
The Queen	1,590	1,819	792	4,201
Prince Willem Alexander	310	463	235	1008
Princess Máxima	310	348	235	893

Source: www.koninklijkhuis.nl

When ministerial responsibility was introduced in the Constitution of 1848 the relationship between king and ministers changed. All powers nominally vested in the king would be exercised by 'the king acting under ministerial responsibility'. Apart from hereditary succession and financial status the system no longer allowed personal rights of the king. King and the ministers together form the government (Art. 42 of the Dutch Constitution). The political inviolability of the king means that his personal views have to be kept outside the political debate. The king's personal opinion on government policies must remain confidential. Therefore the weekly consultations with the prime minister are important to present one face to the outside world. There is also an unwritten rule that 'derived' ministerial responsibility applies in respect of discharge of representative duties and other acts touching upon the public interest. This makes it impossible for members of the Royal House to run for public office. The annual payments received by the king and a number of members of the Royal House are regulated in the Royal House Finances Act. To a considerable extent the persons falling under this Act are exempt from taxation (Art. 40 of the Dutch Constitution).

In February 2009 former Minister of Finance Gerrit Zalm presented a report which states that the Dutch monarchy costs 39 million euros a year.⁴ The Royal House contributes to the proper functioning of the state and is one of the most important elements in the public relations of the Netherlands. The personal inviolability of the king implies that the king is immune to criminal prosecution. On the understanding that they will always be conducted in the name of a representative, civil proceedings are not precluded. Because

the Kingdom of the Netherlands is a democratic state under the rule of law, the government understands that the queen has to accept criticism. In 2003 two citizens had to pay a fine of 250 euros, one for insulting Prince Willem-Alexander and Máxima and the other for throwing paint at the Golden Carriage on the day of their marriage. It rarely happens in the Netherlands, but on 30 July 2007 the Amsterdam court sentenced Regilio A. to pay a fine of 400 euros because he had insulted a police officer and the queen. He also stayed one week in jail. According to criminal law since 1881 the maximum penalty for offending the king is five years in jail. From the perspective of freedom of speech this is too long if one compares it with the maximum of two years in jail in normal cases concerning the rules of offending between citizens.

Monarchical design and powers

The Constitution of 1983 attributes scarcely any powers to the government. But in Dutch Law the government is regarded as the 'engine behind the system'. This role has been strengthened by the development of the welfare state and ever-increasing internationalization and Europeanization. The government is a composite body made up of the monarch and one or more ministers. Both are entrusted with powers of government. Some powers belong to the monarch alone and some to the ministers alone. The powers of the monarch are those which accrue to a head of state. The powers wielded by the ministers, such as the right to head a ministry or to countersign documents, are granted by law.

The Constitution does not actually use the term 'head of state', but Article 2(3) of the Statute does refer to the 'head of the Kingdom'. As head of state, the monarch acts as the representative of the Netherlands in external relations. The head of state also plays a key role in cabinet formation by appointing an *informateur* and a *formateur*. The monarch abdicates in his capacity as head of state, though abdication by royal decree is preferred.

As part of the government, the monarch shares the powers that accrue to the government, but the extent of those powers remains behind closed doors. The monarch meets the prime-minister once a week. However, there must always be a minister who is accountable for the actions and decisions of the monarch regardless of whether or not the monarch plays an active role in government.

It is precisely because the formation of a cabinet in the Netherlands is so closely related to the government that the role played by the monarch in this process should not be dismissed when the position of the monarchy in constitutional law is under review. After all, the monarch plays a key role in the formation of a cabinet. Indeed, up to the moment that the *formateur* (in most cases) takes office as prime minister and places his signature under the appointments of the other ministers, the monarch, who is guided by a succession of advisors, is the only empowered organ in the cabinet formation. The Constitution does refer to the appointment and dismissal of ministers and says that ministers who have relinquished office are allowed to retain their seat in the Chamber.⁵ However, it is totally silent on the subject of cabinet formation. Effectively, the process of cabinet formation is part of the unwritten constitutional law of the Netherlands, rooted in national history and evolving with years of practice. In the nineteenth century cabinets were even formed out of the public eye and without parliamentary involvement. There was no connection with the doctrine of ministerial responsibility. The power of the monarch only started to diminish as the power of the Second Chamber grew and political parties gathered strength. Still, the monarch remains the spider in the web of cabinet forma-

tion right up to the present day: the monarch may appoint *informateurs* and *formateurs* as he or she sees fit, without any formal approval. This state of affairs is explained away by the need for ‘continuity’ of government. The monarch’s role is limited to process and progress.⁶ It would be difficult for the monarch to make ‘sovereign’ decisions. Moreover, the (*in*)*formateur* is ‘entirely dependent’ on the parliamentary parties or their chairpersons.⁷ But Queen Beatrix has formal tasks, like the cabinet formation, the Address from the Throne and she co-signs new Acts of Parliament. She plays a cohesive, representative and encouraging role for the people of the Netherlands, contributing to social stability, continuity and progress. The monarch represents the Kingdom of the Netherlands at home and abroad and attends official events. The real problem seems to be that cabinet formation in the Netherlands still conveys an impression of personal power exercised at the expense of public power. Cabinet formation is seen as the blind spot on the landscape of Constitutional law in the Netherlands.

The Dutch Constitution accords a central role to the monarch. It is patently monarchical in design with no clear explication of the legitimacy of government authority.⁸ Chapter 1 deals with constitutional rights. Chapter 2, which deals with the government, is split into two parts: the first devoted to the monarch and the second to the monarch and the ministers. Hence the government – not Parliament – comes first in the Constitution – and the monarch comes first in the government. This is because the Constitution of 1815 was based on the personal rule of the monarch, a legacy that also left its stamp on the Constitution of 1983. Hence, the ministers served the king and had to win his cooperation

to pass laws. It was not until revolution was sweeping across Europe that the principle of political ministerial responsibility was formally introduced in the Netherlands. The powers of Parliament were extended, and as a counterpart the Crown was given the right to dissolve the Chambers. It still took another twenty years (1868) for the king and his ministers to bow to Parliament. Since 1868 a Chamber may be dissolved only once as a result of a confidence crisis.

In keeping with Thorbecke's dualist system, the parliaments which have been elected by popular vote since 1866-1868 have been regarded as the basis of governance in the Netherlands. However, it is the government – or more specifically the cabinet – which is the engine. For example, the cabinet is assumed to enjoy the confidence of Parliament unless proven otherwise. This unwritten rule implies a sort of top-down approach, even though it does reasonably chime with the primacy of the power of the executive in a complex welfare state, so strongly influenced by legislation from international organizations and the effects of the global economy, that Dutch parliament in many important issues stays behind.

Though the Dutch Constitution does not exactly say that the monarch is head of state, this role is generally seen as an attribute of kingship. According to Douwe Jan Elzinga, the job description of the Dutch head of state is not in conformity with the requirements of the constitutional neuter, especially the role that the Queen plays on the day of the Queen's speech (*Prinsjesdag*). Article 65 of the Constitution states the following: 'A statement of the policy to be pursued by the government shall be given by or on behalf of the King before a joint session of the two Houses of the States General

that shall be held every year on the third Tuesday in September or on such earlier date as may be prescribed by Act of Parliament.' When the Queen reads out this Address from the Throne at the start of the parliamentary year, it gives the impression that the head of state is materially involved in political and party political dimensions of government policy. It is questionable whether the reading out of policy plans of a cabinet by the Queen is in line with the politically-neutral role of the head of state. Elzinga suggests that the Address from the Throne should be split into two parts: after the opening words and the general speech by the Queen, the Prime-Minister presents the policy plans of the cabinet. Elzinga also underlines that the chairmanship of the Council of State for the Queen is not in conformity with the role that the head of state has as part of the constitutional neuter.⁹ This is problematic for the Dutch monarchy if the presence of a neuter is seen as a crucial part of the representative democracy and if this constitutional neuter plays a role in the elimination of the discrepancy between monarchy and democracy.

Article 2 of the Charter of the Kingdom of the Netherlands (an agreement between the Netherlands, the Netherlands Antilles and Aruba, originally stemming from 1954) and Article 42(1) of the Constitution imply the choice of a structure in which the monarch forms part of the government. Needless to say, there are other options, such as the monarch as head of state but not a member of the government. In this case, the Charter as well as the Constitution would need to be revised.¹⁰ The odds of this happening are fairly low. When the monarch accedes to the throne, he or she undertakes to uphold the dignity of the Crown. Queen Beatrix echoed this

precept when accepting an honorary doctorate from Leiden University on 8 February 2005:¹¹

‘As a symbol of the continuity and link between the past and the future, he too, like all public office bearers, is responsible for passing on the office with its dignity intact to the next generation.’

Though the government consists officially of the monarch and the ministers, the Crown can consist of the monarch and only one minister or state secretary (junior minister). When the monarch reigns, he or she does so under ministerial responsibility, as the monarch is inviolate. In the Dutch system there are no ‘personal rights of the king’, apart from hereditary succession, his financial status and inviolability itself.¹² The term ‘king’ is applied with various meanings in the Dutch Constitution, appearing in relation to lineage aspects such as succession and regency, but also in relation to decisions by the government, including appointment by royal decree as understood by Article 42 of the Constitution, which states that the government is formed by the king and ministers. The term ‘King’ (or ‘Queen’) also appears in legislation, though what it really means is the government.

Current legitimization of the monarchy: the bond between the Netherlands and the House of Orange

The use of the colour orange on ceremonial occasions when 'nationhood' is invoked is a reflection of the family name Oranje-Nassau. The royal family in the Netherlands are indirect descendents of Prince William of Orange (1533-1584), also named William the Silent, who can be seen as the founder of the Dutch state. On two days in the year the monarchy in the Netherlands is very visible. *Koninginnedag* or Queen's Day is the celebration of the queen's birthday on the 30th of April, not a private family affair anymore, but a national holiday full of festivities, also the day of 'ribbon rain' on which the monarch honours citizens with medals. The second important annual ceremonial reminder of the function of the monarchy is *Prinsjesdag*. On the third Tuesday in September the queen rides to the parliament buildings for the opening ceremony attended by the members of the States General. The queen delivers the Address from the Throne, written together with the governing cabinet. *Koninginnedag* and *Prinsjesdag* get a lot of attention from the media. Because of the traditional role of the Orange family the Dutch monarchy is firmly established, although Article

30 of the Dutch Constitution is not an obligation to maintain the monarchy. ‘The Dutch people are not monarchists at heart (as for instance the British) but republicans. It is only the high regard for the House of Oranje-Nassau and its role in Dutch history that perpetuates the monarchy. There can be little doubt that if the family were to die out, a republican form of government would be proclaimed immediately’, states William Shetter.¹³

The monarchy has enjoyed the approval of large swathes of the Dutch population over many years. Even when the Dutch state was a confederated republic, it was often (militarily) led by stadholders from the House of Orange-Nassau. For centuries, the historic bond with the House of Orange has been taken as read and customarily associated with the eighty years struggle waged by stadholder Prince William of Orange for freedom, tolerance and independence from Spain in the sixteenth-century. Originally William came from Nassau (in Germany), but in 1544 he acquired the title Prince of Orange (in France). The tradition around freedom fighter William the Silent is a strong tradition, unique in European history, which resonates throughout the ‘Wilhelmus van Nassouwe’, the official Dutch national anthem.¹⁴ In 1932 the Cabinet decided that it should be played on all official occasions, but earlier it had been played or sung on occasions such as the investiture of Queen Wilhelmina in 1898. ‘Wilhelmus van Nassouwe’ itself is very old and probably written by Philip Marnix of St. Aldegonde (1540-1598) around 1568 and dedicated to William the Silent, the prince of German blood. Between 1815 and 1932 the Dutch national anthem was ‘Wiens Neerlands Bloed’ (Whose Dutch blood)

with, especially from a European perspective, horrible lyrics. The national anthem ‘Wilhelmus van Nassouwe’ is not just an attestation of national loyalty, it is a prayer as well: ‘My shield and reliance, art thou O God my Lord’.

Although the bond between the Netherlands and the House of Orange is old, the Netherlands has been a constitutional monarchy only since 1815, when William I became the first king of the constitutional monarchy, orchestrated from London.¹⁵ But one can defend that the idea and practice of having a monarchy was introduced by the French, when Napoleon installed his brother Louis Bonaparte as king in the ‘Kingdom of Holland’. The establishment of a unitary state survived the French period.

One important development is that the socialists have come to accept the Dutch royal house. This is largely the result of the strong personality and actions of Queen Wilhelmina, Mother of the Resistance, during World War II.¹⁶ After her quick withdrawal to London in 1940, Queen Wilhelmina played an important role by supporting the Dutch people under the occupation by the Nazis and inspired the resistance movement. With the exception of King William II and King William III, who both died in office, abdication from the throne seems to be a recent *de facto* tradition in the monarchy of the Netherlands since Queen Wilhelmina and Queen Juliana. When the Queen dies or abdicates, her eldest son or daughter succeeds to the throne. Queen Beatrix has stated that she will not abdicate very soon; she wants to allow the Prince of Orange (‘Crown Prince’) Willem-Alexander and his wife Princess Máxima to spend enough time with their family.¹⁷

The majority of Netherlanders seem happy with the idea that there is someone who stands above the political parties. The head of state and the Royal House symbolize the unity of the Dutch nation and the power vacuum (which exists in many other countries) at the top is filled with the ups and downs of family life in the form of births, christenings, weddings and funerals. Dutch monarchs have been members of the Dutch Reformed Church, but this is not constitutionally required. Millions of people from all shades of the political spectrum followed the marriage of the Prince of Orange to Máxima Zorreguieta and the funerals of Prince Claus, Queen Juliana and Prince Bernhard.

The celebration of the Queen's Birthday (30 April) – not really the birthday of Queen Beatrix but that of her mother, Queen Juliana – seems to illustrate the separation of office and person, but at the same time the office remains very personal. Street parties are held all over the Netherlands, and Queen Beatrix and other members of the Royal House visit festivities in one or two places each year, with live broadcasting on television. Paul Schnabel states: 'In this connection it is also interesting to see how much the colour orange on that day, but actually on all occasions on which national identity wants to be celebrated, has become the colour of the people, clearly differently perceived than the national tricolour, which has remained more the flag of the country and of the state. There is always a need for kings and queens, princes and princesses. They are the archetypes of authority, the symbols of national identity, but also the icons of what is really important in life: the succession of generations and the transfer of values and standards'.¹⁸ What the monarchy

stands for today is not really about religion, the unity of the nation, the fatherland or the kingdom anymore.

When members of the royal family become socially evolved, for instance Prince Claus concerning development cooperation, ‘ambassadors’ for a good cause, Schnabel points out that they look like modern representatives of the old *noblesse oblige*, earning *noblesse* by engaging in unselfish obligations. It is in that way that the members of the royal family contribute to the legitimization of the monarchy in the Netherlands, and they get positive rewards, even from the members of parliament from the Green Left Party. Dorien Pessers states: ‘Politicians are associated with shared interests. The king is associated with the common good. The social orientation of the monarchy is also different. It is true that the king is at the top of the society, but he is really supposed to be concerned about the bottom.’¹⁹ It is probably because of this social and cultural orientation of the Dutch monarchy, an orientation that is also appreciated by more radical and left-wing politicians in the Dutch parliament, that the opposition to the monarchy in the Netherlands is seen as a minority. Of course, the monarchic form of government is not undisputed. Queen Juliana gave rise to discussions when she was influenced by a faith healer. Her husband Prince Bernhard was involved in a questionable enterprise. The views presented by ‘*Het Republikeins Genootschap*’ (the Republican Society), a club with about 150 members, are primarily based on a more egalitarian vision of democracy.²⁰ In 2004 the society did present an alternative for the current Dutch Constitution.²¹ Also active and a little bigger is another republican society, the ‘*Nieuw Republikeins Genootschap*’.²²

Scandals around the monarchy, for instance around the escapades of Prince Bernhard von Lippe-Biesterfeld, the father of Queen Beatrix, or the marriages of Prince Willem-Alexander, Princess Margarita and Prince Johan Friso²³, led to fascinating television and critical articles in the press of course, but as long as the Prime Minister takes full responsibility, the Dutch parliament seems to accept the solutions, and the scandals do not seem to lead to a strong tendency towards the establishment of a republic. When Prince Willem-Alexander, born in 1967, wanted to marry Máxima Zorreguieta, there was a violent debate. It became known that her father had been Minister of Agriculture in the dictatorial regime under general Videla in Argentina, a military junta that ruled Argentina in the 1970s which was responsible for up to 30,000 deaths. But the solution supported by socialist politicians such as former Minister of Foreign Affairs and human rights specialist Max van der Stoep and Prime Minister Wim Kok, was broadly accepted, with Máxima's father agreeing not to be present at their wedding on 2 February 2002. In fact the scandals led to more appreciation for the professionalism and the constitutional carefulness of Queen Beatrix.²⁴ In December 2007, during her annual Christmas speech, Queen Beatrix urged Dutch citizens to be more tolerant. She stated that the Dutch democratic tradition comprises more than only the acceptance of the power of the majority; it is also about respect for minorities. Geert Wilders, the leader of the anti-Europe and anti-immigration Party for Freedom (PVV), called for reducing the monarchy to a purely ceremonial role. Wilders said that he was offended by the Queen's speech, which he described as 'stuffed full of multi-cultural nonsense' largely directed at his party.²⁵ According to a recent poll (29 April 2008) by

Maurice de Hond, the majority of the people in the Netherlands are quite content with the monarchy.²⁶ In answer to the question – should the Netherlands become a republic, or should the Netherlands remain a monarchy? – 70 per cent of respondents think the Netherlands should remain a monarchy, while 25 per cent would prefer to establish a republic. The increase of 5% over the last two years could be related to the popularity of Geert Wilders, who wants Queen Beatrix out of government. Wilders won 9 seats (out of 150) in the elections for the Second Chamber on 22 November 2006, but his nationalistic, conservative, anti-Europe and anti-Islam party P V V is growing strongly in the polls. During the general elections of the 9th of June 2010 the P V V added 15 seats and now are the third party in the Netherlands with 24 seats in the Lower House, three more than the 21 seats of the Christian Democrats.

	2008	2007	2006
The Netherlands should remain a monarchy	70%	71%	76%
The Netherlands should become a republic	25%	23%	20%
Not sure / No answer	5%	6%	4%

Source: Maurice de Hond Methodology: Interviews with 1,000 Dutch adults, conducted on Apr. 29, 2008. No margin of error was provided.

The failed attack on the royal bus in Apeldoorn on Queen's Day 2009 sent shock waves through the Netherlands. Queen's Day is a special occasion with plenty of opportunities for contact between Queen Beatrix and the general public. The

perpetrator Karst T. mortally wounded seven people when he drove his car at high speed through the crowds. No-one had expected anything like this. The car collided to a halt when it hit the fence around a monument shortly after the bus carrying the Royal Family had passed. Although the members of the Royal Family were the target, it was not entirely clear whether Karst T. intended to kill them. When a policeman asked him for his reasons, he said: 'Willem-Alexander is a fascist, he is a racist and I knew that the queen would come here' (*NRC Handelsblad*, 4 September 2009). Karst T. died of his injuries in the night following the attack. A judicial inquiry concluded that it was unlikely that Karst T. had committed the act out of a specific ideology or conviction. In 2004 he had, however, confided to a former employer that he 'wanted to be famous' and had jokingly mentioned that he was considering launching an attack on the Royal House. Friends and family of Karst T. had previously expressed fears that he would take his own life.

Many people – above all the members of the Royal Family – were deeply shocked by the attack. Queen Beatrix made a television appearance on the same day to express her sympathy for the loved ones of the dead and wounded. Her sincere and deeply human concern made a profound impression. Everyone knew that members of the Royal Family could have been killed in the attack – which strengthened the bond between the people and the Oranjes. Indeed, Queen Beatrix received a dignified applause from the crowds that had gathered on Dam Square, Amsterdam, for the Remembrance Ceremony a few days later on 4 May 2009. The members of the Royal Family said they wanted to continue as usual. No official duties were struck off the agenda. But the attack did raise

questions about the relationship between the open character of Queen's Day and the security arrangements. It also raised questions as to whether it was prudent to transport the Royal Family on one bus.

Sovereign power

One of the complicated problems with the tension between monarchy and democracy has to do with the word sovereignty. Sovereign power has a bad reputation and is often confused with absolutism. But the theory of sovereignty, originally developed in the thirteenth century in France and England, is not linked to the absolutist period. It appears among the statistes (Machiavelli, Bodin, Hobbes), the theologians (Luther, Calvin, Suárez, Mariana) and the liberals (Locke), and its definitions and implications differ with every author. It is important to understand that sovereign power was defined by *contrasting* it with feudalism and despotism. Feudal power is always acquired 'at the end of a sword, a shield, and a standard', said the Huguenot Philippe du Plessis Mornay.²⁷ Feudalism governs its subjects as the father of a family does his slaves. For Montesquieu despotism does not constitute an addition to the Aristotelian triad of good political regimes (monarchy, aristocracy, republic), nor does it reproduce in a new category the pathology dispersed among the degenerate political forms (tyranny, oligarchy, democracy). For Montesquieu despotism was a type

of government essentially 'foreign', it was the 'other' state, distant from Europe in a geographical sense, socially cut off from Western civilization, finding the roots of despotism in countries like Persia, Turkey and China. With Montesquieu one can seriously contend that the idea of despotism conflicts with the European civilization, but not the idea of monarchy.

It is even possible to start the concept of a single Europe with the Roman Empire or with Charlemagne's 'Holy Roman Empire'. And was it not King Henry IV of France who presented the idea of the 'Christian Commonwealth of Europe' in the beginning of the seventeenth century, not to mention the European aspirations of Emperor Napoleon? Considering more recent history it is well known that Queen Beatrix strongly supported the process of European integration, in her eyes based on the need to avoid war, especially after the experiences of the Dutch nation during World War II, and probably also based on her personal experience, with a German father and a German husband. For her and many of her generation it was vital to bring Germany within the European partnership. In that light the placing of French and German coal and steel production under a 'High Authority' in 1951, with power to make legally binding decisions, seemed more than logical. The European Coal and Steel Community Treaty introduced the idea of 'community' with distinct legal personality, represented by autonomous institutions and Member States that ceded 'national sovereignty' to institutions for defined purposes. After the loss of the Dutch East Indies (since 1949 Indonesia) the Dutch profited enormously from the open economy and the 'common market' with the 'four freedoms' in Europe. The wider agenda

of an integrated European Union is not seen as conflicting with the Dutch monarchy as long as the process of European integration is good for the Dutch economy and respects the national identity and constitutional tradition of the Netherlands (Article 4 TEU), although it is known that Queen Juliana did see the euro-sceptic United Kingdom becoming a Member State of the European Communities in 1973 as one of the most important successes of the foreign policy of the Kingdom of the Netherlands after World War II!²⁸

Parliament and government, including Queen Beatrix, are fully aware that the survival of the Dutch economy in the global economy depends very much on an effective European Union and the harmonious development of economic activities. The European treaties are automatically incorporated into the Dutch legal system at the point of ratification. The Dutch do not seem to have any trouble with the Court of Justice of the European Communities defining the character of the supranational legal order in a pragmatic way, or with the strengthening of rights and interests of nationals through introduction of European citizenship, but a draft EU Constitution was rejected in referenda in France and the Netherlands in 2005, mainly because of the fear for a European 'superstate' and an increase in the democratic deficit. Most Dutch want to see the European Union primarily as a union of states.²⁹ More founded in treaty relationships and the principle of *pacta sunt servanda* of Article 4 (3) TEU, than in a written EU Constitution. Although the task of the European Union is the creation of the common market, meaning the elimination of all obstacles to intra-Community trade in order to merge the national market into a single market, the new EU Treaty, after the Lisbon Treaty came into force on

1 December 2009, mentions secession and mechanisms for withdrawal in Article 50 TEU, which shows some explicit respect for the sovereignty of the Member States.

If we define sovereignty, it has to be stressed that the sovereign is not the same as sovereignty. Sovereignty is the principle of certain autonomy with respect to foreign powers, sovereignty is the public authority for international cohesion, and sovereignty is always limited by divine, natural and fundamental law. If there were no limits, sovereignty would not be different from feudal dominion.³⁰ Montesquieu even presented despotism, government without law and limits, as destructive of the ruler's own interests: 'As people who live under a good government are happier than those who, without rule or leaders, wander about the forests; so monarchs who live under the fundamental laws of their country, are happier than despotic princes, who have nothing to regulate either their own or their subjects' hearts'.³¹ In the constitutional tradition of the Netherlands there is the specific pact that the monarch is a servant of the people, that he will not act as a tyrant and will look after the interest of the people. If not, the people are entitled to armed resistance.³² It was this Calvinistic theory that helped Willem of Orange to break away from the King of Spain (see the Declaration of Independence of 1581, with arguments inspired by Du Plessis Mornay).

One might wonder whether, despite the long-standing bond between the Netherlands and the House of Orange, the evolving democracy might be creating too much tension around the monarchy. Given the doctrine of popular sovereignty, based on universal equality, it is certainly

extraordinary that accession to the throne is determined by the bloodline. In the fore-mentioned speech at Leiden University on 8 February 2005, Queen Beatrix said: 'I did not choose the throne – but I have accepted it. An office that comes to one through birth is, by definition, not an office that is earned by personal merit. It calls, above all, for humility... self-reflection...'. Lack of authority in the execution of a hereditary office is acceptable only if the officeholder is 'virtually silenced'.³³ In a parliamentary democracy this is organized by means of inviolability and ministerial responsibility (Article 42(2) of the Constitution). Inviolability is acceptable because the monarch has, in principle, no autonomous constitutional powers, apart from the power to organize his or her own House with due regard to the public interest (Article 41 of the Constitution). The monarch stands outside the parliamentary debate; ministers may not defend their policies by quoting the monarch's ideas. As the inviolability principle prevents the monarch from being called to account, the ministers bear full responsibility for his or her actions. Thus, government policy has full rein inside and outside Parliament. Ministerial responsibility comes into play in, for example, the counter-signing of a royal decree. Also, if the head of state or a member of the royal house makes a statement or acts in a specific way, the ministers are responsible. Parliament can call the prime minister to account under the terms of ministerial responsibility, even in private matters – provided they affect the public interest.

In principle, the monarch and the prime minister meet once a week to maintain consistency of government. In the event of a conflict the minister or the cabinet must resign, or the monarch can be declared incapable of exercising royal authority. Both situations could potentially endanger the

monarchy; hence, for the sake of the dynasty, the monarch must accede to the will of the cabinet backed by Parliament. Even so, the monarch can still exert a substantive influence: 'As a member of the government, the Queen can exert a strong influence on policy, but this goes unnoticed by the public,' says Van Wijnen, who illustrates at the same time the fragility of the concept of the unity of the Crown and the 'secret of Noordeinde' (royal discretion).³⁴

Cabinet formation: the start of the procedure

When a cabinet has tendered its resignation and assumed caretaker status, the monarch accepts the resignation for consideration and asks the ministers to continue to perform the tasks which they deem to be in the national interest. Article 42(1) of the Constitution states that the government consists of the monarch and ministers; accountable ministers must therefore always remain in office. A caretaker cabinet may not, in theory, take any major decisions which could undermine the negotiations between the political parties, but it must fulfil duties which are in the national interest, such as important business that cannot be postponed. Then the procedure for forming a new cabinet begins. The monarch requests advice from various politicians: the Chair of the First and Second Chambers (Senate and the House of Representatives), the Vice-President of the Council of State,³⁵ the party leaders from the Second Chamber and sometimes ministers of state. These encounters may be regarded as evidence of royal action. The public can consult the media to find out whether certain customs and principles are observed. Failure on the part of the monarch

to respect the principles can be attributed to the caretaker ministers and to the new ministers once the cabinet has been formed. When the new ministers accept office, they effectively affirm that the monarch has adhered to the principles of cabinet formation.

During their meetings with the monarch the Vice-President of the Council of State, the politicians and others offer written and oral recommendations on the composition of the new cabinet and the appointment of an *informateur* or a *formateur*. It is then the task of the impartial monarch to select an *informateur* to explore the various alternatives for a cabinet, or a *formateur* to actually form a cabinet. In principle, the *formateur* is the prospective prime minister and, according to the doctrine, also the best person for reporting later to the States-General on how the cabinet was formed. The monarch is expected to be guided by the election results and the advice and *not* by personal preference. The monarch is impartial and therefore treats all party leaders in the same way. He or she is expected to insist on clear advice and, when in doubt, will follow the recommendations of the ministers of state. The public must be made to feel that the monarch has virtually no powers of decision.³⁶ The official line is that, in a cabinet formation, the monarch acts ‘within the limits of the proffered recommendations’.³⁷

The monarch is expected to use this advice to steer events rationally towards the formation of a cabinet capable of a productive relationship with the States-General. The names of the *informateur* and *formateur* are announced in a bulletin from the Queen’s Office and published in the Government Gazette (*Staatscourant*). So there is no question of a

royal decree – which would, in any case, have to be countersigned by the caretaker cabinet. These appointments are seen merely as preliminary to the eventual appointment of the ministers of the new cabinet. Hence, the *informateur* is not appointed by the Second Chamber but by the monarch. The *informateur* should be seen as the procedural assistant of the monarch, preventing him or her from getting caught up in the political to-ing and fro-ing. When the monarch appoints an *informateur*, he or she follows as far as possible the advice of the party chairpersons, or the largest common divider from the Second Chamber recommendations or the least common multiple thereof.

The Second Chamber cannot change the *informateur* once the appointment has been accepted. The candidate is free to refuse the job. In 1972 Queen Juliana wanted to appoint her special equerry Professor W.F. de Gaay Fortman as *informateur*, allowing him such a wide remit that he could explore all the options. But De Gaay Fortman broke with tradition and declined to act as an extension of the queen. Rumour had it that he did so because he wished to avoid a confrontation with his son Bas, leader of the PPR party, which had increased its number of seats from two to seven. It is also plausible that W.F. de Gaay Fortman had his sights on a ministerial appointment. Indeed, this is exactly what happened in 1973, when he was offered the post of Minister of Home Affairs in the Cabinet of Joop Den Uyl (PvdA).³⁸

The path to a coalition agreement

Whereas an *informateur* can formally accept a request to reconnoitre the possibilities of forming a coalition, a *formateur* will not officially accept the request to form a government until he is sure that an agreement has been reached. If no agreement is reached the *formateur* will not – officially at least – suffer public humiliation. The remit from the monarch may vary but, basically, it makes no difference whether the *informateur* is instructed to look into the possibilities of ‘the broadest possible coalition’ or just ‘a coalition’ as, in the latter case, the viability of a minority cabinet will obviously be explored as well. If the *informateur* proposes a cabinet which cannot count on parliamentary support – as instructed by the monarch – the monarch will not accept his findings. One might defend the system by arguing that the monarch, who must uphold the Constitution, has the power to reject any proposals from the *formateur* for ministerial candidates who, say, have shown little respect for the principles of democratic government and the Constitution.³⁹ In an interview for NOS television on 28 April 2005, Ruud Lubbers, prime minister from 1982 till 1994, said that Queen

Beatrix attempted to exert some influence on the choice of ministers. According to Lubbers, a seasoned veteran of five cabinet formations, the role of the monarch in this process should not be underestimated. The queen made known her ministerial preferences. Lubbers said that ‘there is, of course, “some gentle steering” in the choice of ministers *et cetera*.’⁴⁰

As the *informateur*'s mandate comes from an inviolate source, he is, in theory, personally responsible for his appointment. The *informateur*'s accountability towards Parliament is poorly defined: he cannot be called to account by the Second Chamber. How the mandate is explained – especially to the media – is solely a matter for the *informateur*, who has consistently consulted the inviolate head of state on the matter. Ever since the Jurgens/Mateman motion, tabled on 22 December 1993, *informateurs* have been expected to appear promptly in the Chamber to report on their activities, but there is no question of an obligation.⁴¹ Parliament cannot impose sanctions.⁴² In 1994, the reports by Van Aardenne, Vis and De Vries during the formation of the ‘Purple’ Cabinet sparked a debate between the leaders of vvd, D66 and PvdA, particularly Bolkestein (vvd) and Kok (PvdA). Such a debate at the end of the (in)formative phase is an important point on the scorecard.⁴³ It is a pity that the mandates issued by the monarch make no reference to what is, in effect, the start of parliamentary accountability for *informateurs*. For example, the monarch could refer to the desirability of providing Parliament with information.

The cabinet formation consists of a reconnaissance phase, a negotiation phase, a coalition agreement, a seat allocation,

the nomination of ministers and state secretaries, and a final report. The main roles in the negotiation phase are played by the leaders of the parties in the Second Chamber. The *informateur* has regular meetings with the monarch. The aim is to thrash out the main lines of policy in a coalition agreement, a sort of deal between a few parliamentary parties and the basis for forming a cabinet and defining a programme for the next four years. A coalition agreement with too much detail will undermine the dualism between the government and Parliament. In the final report to the monarch the *informateur* or *formateur* states whether a cabinet can be formed. Before the *formateur* submits the final report the constituent meeting of the (junior) ministerial candidates takes place so that prospective office bearers can get acquainted, sort out any remaining issues and establish the main lines of government policy.

Insufficient accountability towards Parliament

After the negotiations, the monarch is constitutionally obliged to appoint a cabinet that reflects the will of the majority of the Second Chamber. It is not only the appointment and dismissal of ministers and junior ministers but also the organization of departments and the tasks of ministers which are established by royal decree (Articles 43 and 44 of the Constitution). Article 47 of the Constitution demands that laws and royal decrees be signed by both the monarch and the minister(s). Article 48 of the Constitution lays down the principle of a counter-signature for the appointment and dismissal of government officials, whereby certain constitutional events coincide. The prime minister is appointed by royal decree, which he himself has to counter-sign and which, at the same time, concerns the dismissal of his predecessor. Only at this point does the prime minister share the power of the monarch in the formation of the cabinet. He then counter-signs the royal decrees appointing other ministers. After all, he is, as the new prime minister, the person accountable for the new cabinet. Van Wijnen argues that, with the First and Second Chamber and the caretaker minis-

ters having been forced into a position of passive interest, it is the monarch who holds all the reins: 'Everything revolves around the queen, who both leads the process and ensures that no single party grabs power'.⁴⁴

After being appointed, the ministers take an oath of office before the monarch. They also pledge allegiance to the Constitution and promise to execute their office truly and faithfully. Then they assemble on the palace steps for an official photo. Within a short space of time the newly appointed cabinet presents its policy statement in the Second Chamber. The cabinet composition and the programme are debated by the elected representatives, and the ministers wait to find out whether they have won a majority and have therefore been accepted by the Chamber.⁴⁵ The prime minister, having countersigned the decrees, is clearly responsible for the ministerial appointments.

Occasionally, the screening of new ministers lacks proper thoroughness. Indeed, Prime-Minister Balkenende was blamed for inadequate screening during the Bijlhout controversy. A few hours after the government was formed in July 2002, LPF (List Pim Fortuyn) state secretary or junior minister Philomena Bijlhout was forced to resign, because she had lied about her links with the former military dictatorship in Surinam, where she was born. The prime minister is accountable for his actions as *formateur* and for the results of the preceding phase, insofar as this phase has formed a basis for the cabinet formation. In practice, the prime minister does not seem to be accountable for the methods and actions of previous *informateurs* or *formateurs*. As the monarch is inviolate and as the caretaker cabinet cannot be held responsible for, say, the protracted duration of the recon-

naissance or formation phase, no-one is no accountable to Parliament. The formation resulting in the Van Agt Cabinet in 1977 took 208 days. Calling an unsuccessful *formateur* to account is an arduous business. One might apply a system in which the party leaders accept accountability towards the electorate, but there still remains the inviolate monarch who is not covered for derailments, delays, or underperforming *informateurs*, and the caretaker cabinet that does not dare to intervene. According to Queen Beatrix, in our constitutional system the monarchy functions under the protection of ministerial responsibility. Public actions by the monarch during a cabinet formation should therefore be accommodated more formally under ministerial responsibility. To demonstrate this protection the procedures with *informateurs* would have to be restricted and the *formateur* could be nominated by the Second Chamber.⁴⁶

Transparency and inspiration from European integration

Sometimes, the link between the election results and the composition of the new cabinet seems inscrutable to the electorate. In 1977 the largest party, the PvdA, was excluded from the cabinet, which comprised CDA and VVD. More recently, in 2002, when the PvdA, led by Wouter Bos, made dramatic gains in the election, finishing just behind CDA, an attempt to form a CDA-PvdA coalition ended in failure. Balkenende then considered a cabinet of CDA, VVD and D66, even though D66 had taken a battering. Usually, cabinet formations take a long time and make very little sense to the voters. The negotiations take place behind closed doors. What is the point of holding elections if the real choices are not made by the voters but in the horse-trading that precedes the formation of a cabinet? It is also important to realize that too much transparency can slow down the process, as it limits the willingness to compromise. The blame for the anomalies in cabinet formation does not lie with the monarch, but with the (divisions within and between) the political parties, who would do well to get together and agree on a programme before the elections so that the voter knows

exactly how they will govern if elected. Alternatively, the electoral system could be adjusted in line with the British model, where the party with the clear majority is returned to power.

Even though the monarch has very little decisional scope, he or she can still appoint ministers without formal participation by Parliament. In the future, openings must be created for the explicit involvement of Parliament in the 'investiture', the vote of confidence in a new government. People often draw attention to the democratic deficit in the European Union, but the involvement of the European Parliament in the investiture of the European Commission follows a more democratic process than the formation of the Dutch Cabinet. Since the Treaty of Nice the Commission members have been appointed by the European Council (comprising heads of state and government) for a period of five years (Article 17 (3) TEU), but the European Parliament is able to influence the composition of the Commission, as appointments cannot be made until the Parliament has approved first the nomination of the president and then the entire College. Only then can the Council make appointments (Article 17 (7) TEU).

One exciting development is that the candidates for president and then the commissioners (who are nominated by the member states) must appear before the European Parliament. The President of the European Parliament first asks the candidate for the EC presidency to set out his general policy. A debate and a vote then follow, after which the nominees appear for the separate commissions empowered by the European Parliament. In October 2004 the European Parliament used political pressure and threatened to

scupper the entire procedure in order to force prospective president José Manuel Barroso to withdraw his proposed Commission because of discriminatory comments about homosexuals from candidate commissioner Buttiglione.⁴⁷ In the Netherlands the cabinet has already been appointed by the monarch before it reads its policy statement in Parliament. Confidence in the new cabinet is demonstrated by the fact that most of the motions from the opposition are voted off by the coalition. Accordingly, it might be worthwhile to consider the Belgian example and introduce a vote of confidence.⁴⁸

Because of European integration it was possible for a welfare state like the Netherlands to survive after the loss of Indonesia, and the Dutch economy, especially the carrying and transshipment trade, has profited from the advantages of the free market enormously. Rotterdam is the biggest harbour in Europe and Amsterdam Schiphol Airport is seen as the gateway to Europe. The powers of the government have been enhanced by European integration, but the power of the monarch has not really profited from this development. This is because the responsibility for governing the country rests with the cabinet on behalf of Parliament. Since World War II the monarchy has evolved from an institution of power into an institution of confidence. In that light one could argue that with the weakening of the meaning of national borders because of European integration, the importance of the monarchy in its function as a symbol of national identity has grown. While politicians come and go, the Royal Family is always there. In the Netherlands it is possible to abolish the monarchy by an act of parliament, but in the near future the monarchy will remain a highly visible

institution. The process of European integration is not seen as seriously threatening the Dutch monarchy. The authority of the monarch is not spelled out in the Constitution, but depends on personal credibility that needs to be constructed by the monarch and the government together. Therefore the relationship between the monarch and the prime minister is crucial, also for the monarch. Queen Beatrix has shown that she does not rely on the splendour of the regalia and the mystique of royalty. She treats her function as a profession among others.⁴⁹ But because of the monarchical design of the old Dutch Constitution, the monarchy is still an important part of the constitutional identity of the Netherlands, and this identity has to be respected by the European Union according to EU Law (see Article 4 (2) of the Treaty on European Union as amended by the Treaty of Lisbon).

European integration, including the membership of the Council of Europe and the European Union, has made the citizens of the Netherlands more aware of the importance of human rights and democracy. In the Copenhagen Criteria (1993) we find the political criteria under which applicant states could apply for membership. These political criteria required states to have 'stable institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities'. Can the European Union apply standards of scrutiny to other states that it does not apply to its own Member States? Many proposals for constitutional reform to make Dutch constitutional law more democratic failed because of the necessity of a two thirds majority in both houses of parliament. But it is even possible to make the cabinet formation in the Netherlands more democratic and transparent without changing the Constitution.

Conclusion

It is known that Queen Beatrix does not like Member of Parliament Geert Wilders and that she was possibly attempting to prevent the formation of a right-wing coalition that included him. On 7 July 2010 Thomas Landen stated that the maneuvers to exclude Mr. Wilders had angered ordinary Dutchmen. Many voters could be heard complaining: ‘What is the use of going to vote when we are not listened to anyway?’ The general elections in the Netherlands in June 2010 resulted in a victory for the right. The Dutch Constitution, however, grants the Queen the power to appoint a person (or persons) of her choice to initiate and direct negotiations for the formation of a government coalition. By appointing the Labor politician Herman Tjeenk Willink to the position of formation facilitator (*informateur*), the Queen had made it clear that she probably wanted a coalition that included the Labor Party and excluded the Freedom Party of Geert Wilders. Following the elections, Mr. Wilders said: ‘We want to be part of the new government. More security, less crime, less immigration, less Islam – that is what the Netherlands has chosen ... I don’t think other parties can ignore us.’

Wilders seemed, however, to have overlooked the power of the monarch. For months, rumors had been circulating that Queen Beatrix had postponed resigning in favor of her son, 43-year old Prince Willem-Alexander of Orange, until after the 2010 elections because she wanted to thwart Mr. Wilders' governmental ambitions. Although unelected, the Dutch monarch plays the decisive role in the government formation, and can bypass the electorate. Afshin Ellian, a professor of law at Leiden University, criticized the Queen for her role in obstructing a right-wing government. Ellian wrote on his blog. 'Queen Beatrix,' he said, 'has lost her impartiality in the eyes of many right-wing Dutchmen, the major winners of the past elections, namely the VVD and the PVV, have not been able to play a decisive role in the formation of a new cabinet' (www.hudson-ny.org/1400/dutch-establishment-rejects-election-results).

On June 9, 2010, the Liberal VVD won 31 of the 150 seats in the Dutch House of Representatives, compared to 22 in the 2006 general election, and became the largest party in the parliament. The largest winner of the election, however, was the PVV of Geert Wilders, which won 24 seats, compared to 9 in 2006. The parties of the resigning center-left coalition of Prime Minister Jan-Peter Balkenende suffered considerable losses, collapsing after a row over military involvement in Afghanistan. CDA fell to 21 seats from 41; the Labor Party fell to 30 seats from 33; and the Christian Union fell to 5 seats from 6.

According to Thomas Landen the electorate's major swing to the right allowed VVD-leader Mark Rutte to form a government with Mr. Wilders' PVV and the Christian-Democrats.

This coalition would have 76 of the 150 seats and could count on the support of the small right-wing Protestant party SGP (2 seats). Such a VVD-PVV-CDA coalition was that preferred by Mark Rutte. As this coalition would, however, be critical of immigration, multiculturalism, Islam, and the centralization projects of the European Union, while also being one of the most pro-Israeli governments in the world, the Dutch political establishment was dreading a Rutte-Wilders cabinet.

By appointing Herman Tjeenk Willink (Labor Party) as her informer and representative in the coalition talks, Landen assumed that the Queen seemed to make it clear that she wanted Labor to be part of the coalition. But before the elections, Labor had explicitly stated that it would never form a government with the PVV. With the Labor politician Tjeenk Willink in the key role, it seemed obvious that the Queen seemed to direct the Netherlands towards her own preference: a centrist coalition of Liberals, Laborites and Christian-Democrats. Such a coalition would have 82 seats. The elite of the Left and the regents absolutely want to avoid the risk of a cabinet with Wilders, wrote Prof. Ellian. 'Wilders has been preliminarily excluded without the elite even considering negotiations with him.' Ellian further pointed out that this is not just an injustice to Mr. Wilders, but also to his 1.5 million voters 'who have been excluded from an important political process without as much as one relevant argument.'

But in the end things worked out quite well for Mark Rutte, the leader of the Liberal VVD party. In October 2010 Queen Beatrix asked him to form a minority cabinet with the

Christian Democrats (CDA), a centre-right coalition backed by the Freedom's Party (PVV) of Geert Wilders, but with Wilders and his party remaining outside of the government, although he had won the third biggest share of seats in parliament.

There is no cause for alarm – thanks mainly to the stewardship of Queen Juliana and Queen Beatrix. Over the years their impartiality has strengthened government stability in the Netherlands. The notion of a monarch guided by advisors rules out any question of entrenched positions in the process of cabinet formation. In that sense the monarch is an important part of the government system guaranteeing continuity and experience at the highest level. This impression serves the general interest. Because the Netherlands is a country of minorities, who favour the elective system of proportional representation, fixing a government agreement can be very complicated. The 'caretaker' period after a cabinet has resigned can take quite long. Given the increased powers of the parties and party leaders in the Second Chamber – who have a considerable say in the coalition agreement – the democratic deficit in cabinet formation in the Netherlands does not mean that the government system is autocratic. Although the monarchic form of government in the Netherlands is not undisputed, most political parties will not start a fundamental debate because of the historic ties between the Netherlands and the House of Orange. This could change with the increasing popularity of the populist, Geert Wilders and his PVV⁵⁰.

But, should one, just because things work out in practice, resign oneself to the fact that the situation in the Nether-

lands is not entirely constitutional, elective or democratic? In the Netherlands the cabinet formation takes too long. The independent and inviolable king chooses *informateurs* and *formateurs* and formulates their instructions. Why can the Second Chamber not elect the *formateur* after the elections? Unless the *formateur* joins the new cabinet, neither the *informateur* nor the *formateur* is accountable to the Second Chamber. Thom de Graaf, a former leader of D66 (Democrats 66), a more radical liberal party in the Lower House, said:⁵¹

‘In this day and age every act of government demands transparent accountability and democratically legitimized authorization. The principle of protective ministerial responsibility does not alter the fact that royal powers of governance are neither necessary nor desirable in a modern monarchy. The formation of a cabinet can hinge on decisions which have profound implications for the question of which coalition is returned to office. In such decisions ministerial responsibility can, in any case, only be artificially construed after the event.’

The formal involvement of Parliament in the formation of the cabinet should be more clearly expressed constitutionally. Citizens need to be made more aware that the institutions that derive their mandate from democratic elections should also call the tune. Regrettably, the importance of the *election* of government officials is underestimated in the Netherlands. Precisely because hereditary rights have no place in egalitarianism, the formation of a cabinet should be organized more democratically and enshrined in (constitutional) law. This would also be in the interest of the monarch, who otherwise runs the risk of embroilment in

political brinkmanship and career promotion. All hints of arbitrariness, inequality and regency-monarchical systems must be avoided. Out of respect for the principles of the democratic state the procedure for forming a cabinet should be written into the Constitution and preferably include an investiture.⁵² This is more likely to enhance than undermine the authority of the monarch. The procedures leading to the formation of the Dutch Cabinet do not sufficiently reflect the principles of constitutionalism and sovereignty of the people or the increase in popular and parliamentary power. The Netherlands can learn some lessons from the constitutional law of the European Union.

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Notes

- 1 Karel Kraan, 'The Kingdom of the Netherlands', in: Lucas Prakke and Constantijn Kortmann (ed.), *Constitutional Law of 15 EU Member States*. Deventer: Kluwer, 2004, p. 591, 592, 595.
- 2 Van der Pot, *Handboek van het Nederlandse Staatsrecht*. Bewerkt door D.J. Elzinga, R. de Lange m.m.v. H.G. Hoogers. Deventer: Kluwer, 2006, p. 491-492.
- 3 Van der Pot, *op.cit.*, p. 494.
- 4 [www.minaz.nl/Actueel/Kamerstukken/2009/Februari
Rapport_herziening_stelsel_kosten_Koninklijk_Huis](http://www.minaz.nl/Actueel/Kamerstukken/2009/Februari/Rapport_herziening_stelsel_kosten_Koninklijk_Huis)
- 5 See Articles 43, 48 and 57 (3) of the Dutch Constitution.
- 6 Proceedings of the Second Chamber (House of Representatives or Lower House), 1999/2000, 27409, no. 1, p. 2.
- 7 C.A.J.M. Kortmann, *Constitutioneel recht*. Deventer: Kluwer, 2008 (6), p. 156.
- 8 J.W. Sap, 'Vertegenwoordiging van het volk als soevereiniteitspretentie. Een pleidooi voor dialogisch staatsrecht', in: J.H.M. Engels & M. Nap (eds.), *De ontwikkeling en toekomst van de vertegenwoordigende democratie*. Deventer: Kluwer, 2004, p. 105-139.
- 9 D.J. Elzinga, 'The Monarchy and the Constitutional Neuter; On the Meaning of the 'pouvoir neutre' in the Dutch Democracy', in: D.J. Elzinga (ed.), *The Dutch Constitutional Monarchy in a Changing Europe*. Alphen aan den Rijn: Kluwer, 2007, p. 19-20.
- 10 Article 2 of the Charter of the Kingdom of the Netherlands says that the Kingdom is governed by the King. This should be replaced by the Government.

- 11 *Koningin Beatrix aan het woord. 25 jaar troonredes, officiële redevoeringen en kersttoespraken*. Edited by Carla van Baalen and others. Den Haag: Sdu, 2005, p. 422.
- 12 Karel Kraan, 'The Kingdom of the Netherlands', in: Lucas Prakke and Constantijn Kortmann, *Constitutional Law of 15 EU Member States*. Deventer: Kluwer, 2004, p. 602.
- 13 William Z. Shetter, *The Netherlands in Perspective. The Dutch way of Organizing a Society and its Settings*. Utrecht: Nederlands Centrum Buitenlanders, 1997, p. 88.
- 14 H. Algra, 'De overheid onder het gezag van God – het Huis van Oranje', in: W.P. Berghuis et al., *Antirevolutionair bestek. Toelichting op het beginselen algemeen staatkundig program van de Anti-Revolutionaire Partij*. Aalten: De Graafschap, 1964, p. 34-42, esp. p. 41.
- 15 John W. Sap, *The Netherlands Constitution 1848-1998. Historical Reflections*. Utrecht: Lemma, 2000, p. 103-107.
- 16 D.J. Elzinga, *op.cit.*, p. 12-15.
- 17 For the succession of Queen Beatrix the following order of priority applies for the first five persons: 1. HRH Willem-Alexander, the Prince of Orange, Prince of the Netherlands, Prince of Orange-Nassau, Jonkheer van Amsberg (eldest child of the Queen); 2. HRH Princess Catharina-Amalia of the Netherlands, Princess of Orange-Nassau (first child of the Prince of Orange); 3. HRH Princess Alexia of the Netherlands, Princess of Orange-Nassau (second child of the Prince of Orange); 4. HRH Princes Ariane of the Netherlands, Princess of Orange-Nassau (third child of the Prince of Orange); 5. HRH Prince Constantijn of the Netherlands, Prince of Orange-Nassau, Jonkheer van Amsberg (third child of the Queen).
- 18 Paul Schnabel, 'Modern Monarchism; From 'Vivat Oraenge' to 'Long live the Queen'', in: D.J. Elzinga (ed.), *The Dutch Constitutional Monarchy in a Changing Europe*. Alphen aan den Rijn: Kluwer, 2007, p. 34.
- 19 Dorien Pessers, 'The Symbolic Legitimizations of the Constitutional Monarchy', in: D.J. Elzinga (ed.), *The Dutch Constitutional Monarchy in a Changing Europe*. Alphen aan den Rijn: Kluwer, 2007, p. 60.
- 20 Tom Rooduijn (red.), *De republiek der Nederlanden. Pleidooien voor het afschaffen van de monarchie*. Amsterdam: De Bezige Bij, 1998.
- 21 H.U. Jessurun d'Oliveira, M.H. Kleinsma, J.H. Reestman, P. Vinken, W. Voermans, *Grondwet van de Republiek Nederland*, Amsterdam: Prometheus, 2004.
- 22 See www.republikeinen.nl/NRG2/index.asp

- 23 Prince Friso, the second son of Queen Beatrix and prince Claus, has lost his right to the throne because his marriage with Mabel Wissel Smit was not approved by Dutch parliament. See Peter Siebelt, *Mabel. Koninklijk Bal Masqué*. Soesterberg: Aspekt, 2004.
- 24 J.Th.J. van den Berg, 'Saevis Tranquilla in Undis, Queen in Times of Populism', D.J. Elzinga (ed.), *The Dutch Constitutional Monarchy in a Changing Europe*. Alphen aan den Rijn: Kluwer, 2007, p. 76.
- 25 Elsevier, 27 December 2007.
- 26 Angus Reid Global Monitor: Polls & Research, 14 May 2008. See www.angus-reid.com/polls/view/30698/most_Dutch_content_with_monarchy.
- 27 Philippe du Plessis Mornay, *Vindiciae contra Tyrannos*, Edinburgh, 1579, Paris, 1581, p. 24. *Vindiciae contra Tyrannos* is the most influential of the Huguenot political works. The book consists of four questions and their answers: 1. Are subjects bound to obey a prince if their orders contradict the law of God? The answer is no. 2. Who may resist such a prince? The people as a whole, the officers of the people, but also a private person who has received a special call from God to save the people from a tyrant. 3. Can a prince who devastates the commonwealth be resisted? Yes, the people created the French monarchy and the officers of the kingdom, and the Estates General elect the king. There is a covenant between king and people in which the king pledges to rule justly. If he violates that pledge by bad law or overtaxation, the people or their officers can resist and depose him. The final question establishes that neighbouring princes are obliged to aid the subjects of a prince who is a tyrant.
- 28 J.A. de Koning, 'Het Nederlands beleid inzake de as Parijs-Bonn in historisch perspectief (1957-1973), ofwel: Nederland op de bres voor het Britse EG-lidmaatschap', in M.C.J. Jehee, J.A. de Koning en J.W. Sap, *De Frans-Duitse as: tirannie of sympathiek*. Groningen: Wolters-Noordhoff, 1996, p. 43-59.
- 29 See Recommendation 21 of the National Convention, in: R.J. Hoekstra, chairman, *Hart voor de publieke zaak. Aanbevelingen van de Nationale Conventie voor de 21ste eeuw*. Den Haag: Nationale Conventie, September 2006, p. 51-56.
- 30 Blandine Kriegel, *The State and the Rule of Law*. Translated by Marc A. LePain and Jeffrey C. Cohen. Princeton, New Jersey: Princeton University Press, 1995, p. 15-32.
- 31 Baron de Montesquieu, *The Spirit of Laws*. Edited by David Wallace

- Carrithers. Berkeley: University of California Press, 1977, p. 142.
- 32 B.P. Vermeulen, A.P. Krijnen, D.A. Roos (ed.), *De Koning in het Nederlandse staatsrecht*. Nijmegen: Ars Aequi, 2005, p. 9-11.
- 33 Reiner de Winter, *De overheid. Overzicht van het Nederlandse staatsrecht*. Den Haag: Sdu, 1994 (2), p. 12.
- 34 Harry van Wijnen, *De macht van de kroon*. Amsterdam: Balans, 2000, p. 20, 41.
- 35 See Article 1 of the *Wet op de Raad van State*. Thom de Graaf (former minister of government renewal and kingdom relations, former chairman of D66 and former lecturer in constitutional law at Nijmegen) says that an end must come to the charming but basically erroneous tradition whereby the monarch presides (pro forma) over the main advisory organ to the government, the Council of State. See Thom de Graaf, 'Ontneem de macht, behoud het gezag', *Trouw*, 30 April 2005.
- 36 J.J. Vis, 'Ministeriële verantwoordelijkheid en kabinetsformatie', in: D.J. Elzinga (ed.), *Ministeriële verantwoordelijkheid in Nederland*. Zwolle: W.E. J. Tjeenk Willink, 1994, p. 177-185, esp. p. 180-181.
- 37 Proceedings of the Second Chamber, 1999-2000, 27409, no. 1, p. 4.
- 38 Peter Bak, *Een soeverein leven. Biografie van W.F. de Gaay Fortman*. Amsterdam: Mets & Schilt, 2004, p. 248.
- 39 Although it is possible for politicians to try to amend the Dutch Constitution, with two third majority in both houses of parliament, it is open to question whether a politician like Pim Fortuyn, in view of his plea to repeal Article 1 of the Constitution (prohibition on discrimination), would have passed the constitutional-political test for ministerial office. The same counts for Geert Wilders, who shares some opinions of Pim Fortuyn.
- 40 'Lubbers: Beatrix stuurt keuze ministers', *NRC Handelsblad*, 29 April 2005.
- 41 Article 139a of the Rules of Procedure for the Second Chamber states: 'After an order for Cabinet (in)formation has been fulfilled the Chamber can decide to invite a *formateur* or *informateur* or *formateurs* or *informateurs* to provide information on the progress of the procedure.'
- 42 Proceedings of the Second Chamber, 1993-1994, 21427, no. 98. See also J.W. Sap, *Kritiek op de staat. Voorwerk voor staatkundige, bestuurlijke en staatsrechtelijke vernieuwing*. Groningen: Wolters-Noordhoff, 1998 (2), p. 277-291, esp. 283.
- 43 A.K. Koekkoek, 'De kabinetsformatie van 1994. Een ouderwetse forma-

- tie van een nieuwe combinatie', *NJB*, Vol. 69, no. 41, 18 November 1994, p. 1411-1415, esp. p. 1415.
- 44 Harry van Wijnen, *op.cit.*, p. 101.
- 45 In 1939 the fifth Colijn Cabinet was dismissed the first time it took action when the Second Chamber approved a motion submitted by L.N. Dekkers, chairman of the RKSP, the Roman Catholic Political Party, a Dutch Catholic Christian Democratic Party founded in 1926. This cabinet – comprising many liberal and unaligned former officials from Dutch Indonesia – was formed outside the parties by Colijn, who interpreted the formation mandate as if it were a royal command. There was no support base in the Second Chamber for a cabinet consisting mainly of persons unaligned with political parties.
- 46 In the early 1990s one broadly held conclusion by the Deetman Report on the question of the *informateur* was that the appointment of an *informateur* cannot be avoided but should be treated as 'exceptional'. This conclusion was to be effectuated in the 'constitutional procedures'. See Proceedings of the Second Chamber, 1993-1994, 21427, no. 101.
- 47 W.T. Eijsbouts, 'The Barroso Drama. Campidoglio, Rome – 29 October 2004: How the form was brought to matter', *European Constitutional Law Review*, Vol 1, Issue 2, 2005, p. 155-174.
- 48 Godelieve Craenen. 'Het Koninkrijk België', in: L. Prakke & C.A.J.M. Kortmann, *Het staatsrecht van de landen van de Europese Unie*. Deventer: Kluwer, 1998 (5), p. 28-29.
- 49 William Z. Shetter, *op.cit.*, p. 88.
- 50 Barbara Rijlaarsdam en Kees Versteegh, 'De koningin aanpakken, dat moet je durven. Positie van het staatshoofd staat ter discussie', *NRC Handelsblad*, 16 november 2010, p. 3.
- 51 Thom de Graaf, 'Ontneem de macht, behoud het gezag', *Trouw*, 30 April 2005.
- 52 See Recommendation 11 of the National Convention, in: R.J. Hoekstra, chairman, *Hart voor de publieke zaak. Aanbevelingen van de Nationale Conventie voor de 21e eeuw*. Den Haag; Nationale Conventie, September 2006, p. 29-32.

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